

**STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE
Docket No. 2000-01**

**Re: TENNESSEE GAS PIPELINE COMPANY
LONDONDERRY 20" REPLACEMENT**

**ORDER ON MOTION OF TENNESSEE GAS PIPELINE COMPANY
TO AMEND AND CLARIFY THE CERTIFICATE OF SITE AND FACILITY**

On May 25, 2001, Tennessee Gas Pipeline Company (Tennessee or Applicant) filed a document entitled Motion of Tennessee Gas Pipeline Company to Amend and Clarify the Certificate of Site and Facility (Motion). On June 12, 2001, the Londonderry Neighborhood Coalition (LNC) filed an objection to the Motion. The remaining parties in this docket, Town of Londonderry, Londonderry School District (TOL/LSD) and Public Counsel did not file written objections to the Motion. The Committee issued orders of notice of a public hearing on the Motion. Notice of the public hearing was published in a timely fashion in newspapers having a general circulation in Hillsborough and Rockingham Counties.

After a public hearing on the Motion, the Site Evaluation Committee (Committee or SEC) voted to grant the Motion in part and to deny the Motion in part. Additionally, the Committee voted to set a deadline for the construction of that portion of the proposed pipeline which has been referred to as Alternate I. This decision sets forth the reasons for the Committee's decision.

I. PROCEDURAL BACKGROUND

On December 28, 2000, after public informational hearings and a complete adversarial hearing, the Committee issued a Decision and Order granting a Certificate of Site and Facility (Certificate) to Tennessee to construct, install and operate 19.3 miles of a twenty inch replacement pipeline commencing in Dracut, Massachusetts and terminating in Londonderry, New Hampshire, along with delivery point facilities, including a meter station (Project). As part of the Project, Tennessee would abandon and remove an existing eight inch pipeline. In granting the Certificate, the SEC considered a number of alternative routes but eventually determined that the Project should be constructed, installed and operated entirely within the existing right of way corridor. On February 23, 2001, the Committee issued an Order which, for the most part, denied motions for rehearing filed by TOL/LSD, LNC and the Applicant.

As this Committee was considering Tennessee's Application for a Certificate of Site and Facility, pursuant to RSA 162-H, Tennessee was also seeking a Certificate of Public Convenience and Necessity from the Federal Energy Regulatory Commission (FERC) pursuant

to Section 7(c) of the Natural Gas Act, 15 USC 717, *et seq.* On October 27, 2000, FERC granted a Certificate of Public Convenience and Necessity to Tennessee for the Project. The FERC Order Issuing Certificate and Granting Abandonment Authority became part of the record in the proceedings before this Committee. See, Exhibit 91. Subsequently, TOL/LSD and the LNC filed motions for rehearing before the FERC. FERC granted rehearing for the purpose of considering the motion. On May 3, 2001, FERC issued an order which, in part, granted reconsideration (FERC Reconsideration Order.)

The FERC Reconsideration Order requires Tennessee to re-route approximately .46 miles of the replacement pipeline which runs adjacent to the Londonderry public schools to an area that is approximately 200 to 300 feet to the west of the existing right of way which houses the existing 12 inch pipeline. This re-route had originally been considered by FERC as Alternate I and had been rejected. Although FERC did not agree with the rationale presented by TOL/LSD and the LNC, it nonetheless ordered the re-route to accommodate the concerns of the intervenors. FERC Reconsideration Order p. 13-14. Subsequent to the FERC Reconsideration Order, the Applicant filed new alignment information which actually requires the replacement pipeline to be constructed approximately 40 feet west of the original Alternate I alignment in order to accommodate TOL/LSD's desire to construct a sewer line in the vicinity. FERC has approved the new alignment for Alternate I and issued a Notice to Proceed to Tennessee.

II. TENNESSEE'S MOTION

In the light of this procedural history, Tennessee now asks the Committee to amend the Certificate to include the Alternate I re-route of the replacement pipeline as finally ordered by the FERC and to delegate to the Department of Environmental Services (DES) the authority to make any further amendments to the existing permits and approvals as may be necessary to conform them to the requirements of Alternate I as it presently exists. Additionally, Tennessee requests that the Committee "clarify" the language of environmental condition 58(g)(iv) "to make the appropriate distinction between the criteria applicable to dry and wet water body crossings."

In support of its request that the Committee amend the Certificate and adopt Alternate I, Tennessee asserts that the construction of Alternate I will result in an "insignificant" or "negligible" increase in impact to wetlands and that the adoption of Alternate I would not materially affect the Committee's original determination that the Project meets the statutory criteria set forth at RSA 162-H:16. Tennessee also presented correspondence and evidence demonstrating that Alternate I would not have an adverse impact on historic sites, or endangered or threatened wildlife species¹.

¹ Approval of Phase 1-B archeological sampling by Gary W. Hume, State Archeologist, New Hampshire Division of Historical Resources dated May 8, 2001, Motion, Tab D; Letter dated March 16, 2001, from Michael Amaral, Endangered Species Specialist, New England Field Office, United States Department of the Interior, Fish and Wildlife Service, Motion, Tab E; "Rare Threatened and Endangered Species Survey and Mitigation Report, February, 2001," Motion, Tab C.

Tennessee also seeks clarification of environmental condition 58 (g)(iv). The condition reads as follows:

DES will not seek penalties or fines, beyond the cost of mitigation under Condition 58 (f), for any exceedence of the 10 NTU turbidity standard outside of a designated mixing zone for which Tennessee demonstrates all of the following to DES's satisfaction within thirty (30) days of the exceedence:

...

iv. The exceedence did not result in a severity level exceeding 7 under Newcombe and Jensen's model, or in any other severe impairment of a beneficial use of the affected surface water.

Tennessee requests that the following language be substituted for subsection iv of the condition:

In the case of a dry crossing, the exceedance did not result in a severity level exceeding 7 under Newcombe and Jensen's model, or in any other severe impairment of a beneficial use of the affected surface water. In the case of a wet crossing, the exceedance did not result in any severe impairment of a beneficial use of the affected surface water.

In support of its request, Tennessee asserts that the Newcombe and Jensen model is inapplicable to wet crossings and that the standard set by environmental condition 58 (g)(iv) cannot be met with respect to wet crossings. Tennessee also asserts that, in the past, DES has authorized an amendment to similar language and that the Committee should adopt its request for the purpose of consistency.

At the public hearing held on July 9, 2001, Tennessee also requested that the Committee delegate authority to the DES to grant extensions of time for construction of Alternate I despite the fact that construction might occur after the commencement of the school year for the Londonderry schools.

III. OBJECTIONS TO TENNESSEE'S MOTION

The Committee received two objections to the Tennessee Motion:

Londonderry Neighborhood Coalition

LNC filed a written objection to the motion. In its written objection, the LNC asserts that an appropriate environmental review should be conducted prior to any amendment and that the review should include but not be limited to a thorough analysis of the impact of Alternate I on threatened or endangered species of wildlife.

Counsel for LNC did not appear at the public hearing. However, Collette Gabbidon, President of LNC, did appear and cross examine Tennessee's witnesses and also stated the LNC position with respect to the motion. In sum, the LNC, through its questions on cross examination and Ms. Gabbidon's statement, raised its concern that a complete environmental impact statement or assessment has never been performed for the Project.

LNC did not address that portion of Tennessee's motion which requested "clarification" of environmental condition 58 (g)(iv.)

Department of Environmental Services Staff

DES staff issued comments on the Applicant's motion in the form of two memos. *See*, Correspondence, dated July 6, 2001, from Russell A. Nylander, P.E., Chief Engineer, Water Division, Department of Environmental Services to Robert W. Varney, Chairman.

DES noted that employing the Alternate I route would increase the wetlands impact "only slightly when viewed in the context of the entire project." DES did not object to the use of the Alternate I route.

The DES comments did object to that portion of the motion that seeks "clarification" of environmental condition 58 (g)(iv). In its comments, DES explained the purpose of the Newcombe and Jensen Scale and the meanings of the various severity levels. DES noted that the scale measures the effect upon fish populations and is applicable regardless which method of wetland crossing is employed. DES advised that the scale provides a clearly defined and easily calculable standard upon which to base enforcement actions and, therefore, DES objected to that portion of the motion seeking clarification of the condition.

IV. ALTERNATE I

The Committee voted unanimously to grant that portion of the Applicant's motion requesting amendment of the Certificate to permit the use of the Alternate I route. Although the Committee was comfortable with its original decision to site the replacement pipeline entirely within the existing right of way corridor and adjacent to the existing 12 inch pipe, the Committee determined that the proposed reroute should be adopted because it meets the statutory criteria of RSA 162-H:16 and comports with notions of comity and consistency with the federal regulatory process employed by FERC. In addition, the further delay which would likely follow a decision to reject Alternate I would be inconsistent with state energy policy.

A. Statutory Criteria of RSA 162-H:16.

In order to grant a certificate of site and facility, the Committee must consider available alternatives, fully review the environmental impact of the site or route and, considering the objectives of RSA 162-H, find that the proposed energy facility meets the following criteria:

- (a) The Applicant has adequate financial, technical, and managerial capability to assure construction and operation of the facility in compliance with the terms and conditions of the Certificate.
- (b) The site and facility will not unduly interfere with the orderly development of the region with due consideration having been given to the views of municipal and regional planning commissions and municipal governing bodies.
- (c) The site and facility will not have an unreasonable adverse effect on esthetics, historic sites, air and water quality, the natural environment and public health and safety.
- (d) Operation of the site and facility is consistent with the state energy policy established in RSA 378:37.

RSA 162-H:16, IV. Alternate I as proposed by Tennessee meets these criteria.

1. Applicant's Capability.

In our Decision and Order of December 28, 2000, we found that Tennessee has adequate financial, technical, and managerial capability to assure construction and operation of the facility in compliance with the terms and conditions of the Certificate. The proposed Amendment to the Certificate does not affect the financial, technical or managerial capability of Tennessee to assure that the construction and operation of the replacement pipeline is undertaken in full compliance with the terms and conditions of the Certificate.

2. Orderly Development.

The Town of Londonderry and the Londonderry School District do not object to the Motion. Indeed, the Motion seeks to implement a proposal which they espoused before FERC, *See*, FERC Order, p. 12-14, and which was recommended by their consultant, SEA Consultants. Decision, p. 13 -14; *See*, SEA Report (Tab 4), November 3, 2000. The LNC also joined in and adopted the SEA Report¹. *See*, Motion for Rehearing of Londonderry Neighborhood Coalition, dated January 25, 2001.

¹ Although the position taken by LNC before FERC and in its Motion for Rehearing before this Committee might raise issues of judicial estoppel and collateral estoppel we need not reach those issues in this proceeding because we find that Alternate I otherwise meets the statutory criteria of RSA 162-H: 16, IV and should be approved.

In approving the alternative route, FERC attempted to accommodate the Town and the LNC. In its Order, FERC acknowledged its original finding that construction within the existing right of way was the most “reasonable and prudent” option. FERC specifically recognized that the “looping” of pipelines within the same right of way did not cause a violation of safety standards promulgated by the federal Department of Transportation. Nonetheless, FERC found that the alternative route would cause an insignificant increase in environmental impacts but would resolve the concerns of the Town and the LNC.

The Committee has already found that the original route for the proposed replacement pipeline, subject to certain conditions regarding construction and public communication, did not "unduly interfere with the orderly development of the region with due consideration having been given to the views of municipal and regional planning commissions and municipal governing bodies." RSA 162-H: 16, IV (b). *See*, Decision, p. 15. In part, the Committee’s finding relied upon the fact that the replacement pipeline, as originally proposed, was to be constructed and operated completely within the existing right of way corridor.

The amendment of the route sought by Tennessee and already approved by FERC, reroutes the proposed replacement pipeline to an area which is approximately 200 to 300 feet to the west of the existing corridor. The re-routed replacement pipeline is in an undeveloped forested area and is less than one half mile in length. Although it will require the creation of an additional right of way, the new route does move the replacement pipeline, and its associated construction and operation risks, further from the Londonderry school facilities and areas of public assembly. Additionally, the new route remains on property owned by the Londonderry School District. The alternative route is less than one half mile in length and does not present appreciably more interference with the orderly development of the region than was originally foreseen for the construction of the replacement pipeline as originally sited. Having considered these facts, the Committee finds that the proposed amendment of the route does not "unduly interfere with the orderly development of the region with due consideration having been given to the views of municipal and regional planning commissions and municipal governing bodies." RSA 162-H:16, IV (b).

3. Unreasonable Adverse Effects.

In considering an application for a certificate of site and facility, the Committee must consider whether a proposed project would have any unreasonable adverse effects upon 1) aesthetics; 2) historic sites; 3) air and water quality; 4) the natural environment; 5) public health and safety. RSA 162-H:16, IV (c). These factors were thoroughly considered by the Committee in its Decision and Order granting Tennessee’s original Certificate in this docket. The Committee is similarly satisfied that the proposed alternative route will not have an unreasonable adverse effect in any of the statutory areas.

a. Aesthetics

The alternative route, as finally approved by FERC, and urged upon the Committee by the Applicant, does require the additional clearing of trees in an area which is primarily upland forest. However, the Town has already advised the Committee that this area of the school

property may be subject to further school development and has advised the Committee at the public hearing that it intends to install a sewer line in the vicinity of Alternate I. See, Report of SEA Consultants, p. 3 (seeking a similar re-alignment “so that the property is not restricted for future development.”) In light of the fact that the area subject to additional clearing of trees is not accessible to the general public and in any case is located upon lands that the School District may develop, the Committee finds that there are no unreasonable adverse effects upon aesthetics if the alternative route is approved.

b. Historic Sites

In conjunction with its Motion, Tennessee filed a summary of the results of a Phase 1-B archeological study conducted along the proposed alternative route. No significant pre-historic or historic materials were discovered. A collapsed stone wall does exist approximately 20 meters from the study area. However, this wall was found to be historically insignificant. Gary Hume, State Archeologist for the Division of Historical Resources, has reviewed the archeological study and concurred with its findings. The alternative route does not have any unreasonable adverse effect upon historic sites.

c. Air and Water Quality

In our Decision and Order granting the Certificate in this case, we dealt extensively with the effects that the construction of the replacement pipeline would have on air and water quality. The relocation of a small portion of the pipeline 200 to 300 feet to the west does not add to its impact upon air or water quality to any significant degree. Subject to the environmental conditions set forth in the Certificate of Site and Facility, we now find that the alternative route does not have an unreasonable adverse effect upon air or water quality.

d. Natural Environment

The major environmental differences between the approved pipeline route and the proposed alternate route involve the clearing of additional trees in the new right of way corridor and the crossing of three wetland areas which were previously identified by the Applicant as part of its original Application (104+5.62, 104+5.67 and 104+5.95.) The increase in the area of wetlands affected by the alternative route is only .35 acres.

The Committee has already subjected Tennessee to rigorous environmental conditions as part of the original Certificate in this Docket. Those conditions, as well as the relatively small increase in the area of affected wetlands and forests, will ensure that the construction of the replacement pipeline along the alternative route will not have an unreasonable adverse effect upon the natural environment.

Additionally Tennessee has confirmed with the United States Department of the Interior, Fish and Wildlife Service that there are no threatened or endangered species in the area of the proposed alternative route.

The Committee finds that, subject to the conditions contained within the original

Certificate of Site and Facility, the alternative route proposed by the Applicant's Motion will not have any unreasonable adverse effect upon the natural environment. We further find that the supplement to the Project's existing environmental assessment, filed with the Motion, together with the testimony and exhibits introduced at the July 9, 2001, hearing, provide a satisfactory basis for environmental review of Alternate I.

e. Public Health and Safety

Recognizing the risks to the citizens of New Hampshire which are created by the transportation of natural gas, the Committee imposed stringent safety conditions, some of which exceed those required by the federal government, upon Tennessee in the construction, operation and maintenance of the replacement pipeline. The proposed alternative route does not present any circumstances which require any amendment to those safety conditions.

The Committee finds that, subject to the conditions set forth in the original Decision and Order in this Docket, the proposed alternative route does not create an unreasonable adverse impact on the public health or safety.

The Committee does note, however, that the realignment will lessen the incremental safety impact that some of the safety standards which were imposed by the Certificate would afford to the existing 12 inch line. For instance, the installation of witness markers for the replacement pipeline would have also alerted third parties to the existing 12 inch pipeline. The Committee recognizes that the operation of the 12 inch pipeline is not before us in this docket; however, we strongly urge Tennessee to similarly identify the existing 12 inch pipeline. Likewise, the Committee directs the Applicant to maintain communication with TOL/LSD and to ensure that the design and construction of the proposed sewer line does not pose a risk to the integrity of the replacement pipeline.

4. State Energy Policy

There have been no issues raised by either the motion or the objection which would require a review of the Committee's finding that the proposed replacement pipeline is consistent with the State energy policy set forth at RSA 387:37. Indeed, expeditious completion of the pipeline, which is consistent with state energy policy, would be facilitated by the approval of Alternate I, inasmuch as FERC has already directed the use of the alternate route.

B. Consistency of Federal and State Regulation.

The Committee recognizes that consistency in the regulatory process of both the State of New Hampshire and the federal government is necessary in order to achieve the purposes and objectives set forth at RSA 162-H:1. The Committee recognizes that FERC's obligation to carefully review the siting of interstate natural gas pipelines is similar to, if less broad than, the authority granted to this Committee by the New Hampshire Legislature. The Committee believes that FERC's determination to employ Alternate I was made after careful consideration

and a “hard look” at the environmental consequences. *See, Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 374, 109 S.Ct. 1851, 104 L.Ed. 2d 377 (1989); *Wetlands Action Network v. United States Army Corps of Engineers*, 222 F.3d 1105, 1114 (9th Cir., 2000). Although the Committee, acting in a vacuum, would prefer the original route, we recognize that such a position would put the Applicant in an untenable situation, delay the construction of this Project and frustrate the purposes of RSA 162-H:1. Moreover, the incremental impacts of Alternate I are slight. Therefore, the Committee will grant that portion of the motion seeking to amend the Certificate to include Alternate I as approved by FERC.

V. TIMING OF CONSTRUCTION

At the July 9, 2001, public hearing, Tennessee requested that the Committee delegate authority to DES to extend the time frames for construction of Alternate I due to the delay cause by the regulatory process. Tennessee’s oral motion is reasonably related to its request to amend the Certificate. Originally, this Committee ordered Tennessee to consult with school officials to determine when the school and adjacent public facilities would be least used. We further ordered that Tennessee must undertake its construction activities in these areas during the time when the public facilities are least used. The FERC Reconsideration Order, as well as the necessity that the Applicant seek an amendment from this Committee, makes completion of construction before the commencement of the school year improbable. The Applicant’s witness testified that it was unlikely that the original schedule could be met, given the procedural delays occasioned by the change in route alignment, even if the procedural impediments were removed on the date of the hearing. Accordingly, some extension of time for completion of construction in the vicinity of the schools is warranted. However, in order to ensure that the construction in the Londonderry school area causes as little disturbance as possible, the Committee has decided to set a firm date for completion of the construction in the school area. It is not necessary to delegate this authority to DES. Tennessee shall complete construction in the vicinity of the Londonderry schools by September 19, 2001.

VI. DELEGATION OF MINOR ROUTE ADJUSTMENTS TO DES

At the conclusion of the hearing, Tennessee asked the Committee to amend language in the Certificate which delegated to DES the authority to make minor changes. Specifically, Tennessee requested that the Order be amended to specify that DES may approve minor changes in route alignment. The Committee believes that this authority was delegated by the original order and, therefore, will grant Tennessee’s request. DES is hereby authorized to specify minor changes in the route alignment as the Project proceeds through construction. *See, RSA 162-H:4, III-a.*

VII. CLARIFICATION OF ENVIRONMENTAL CONDITION 58 (g)(iv.)

The Committee unanimously voted to deny that portion of Tennessee’s Motion which sought “clarification” of environmental condition 58 (g)(iv). At the outset, it is noted that the proposed “clarification”, in actuality, represented a complete change in the methodology which would be employed in the event that Tennessee exceeded turbidity standards during wet crossings of water bodies and wetlands.

Tennessee claims that this amendment is necessary in order for the Committee to be consistent with action taken by DES during the construction of another, much larger, pipeline facility which was approved by this Committee. However, this Project and the certificate granted for the PNGTS/M&N project are not related to each other and Tennessee has put forth no argument as to why this Project requires consistency with the PNGTS/M&N project.

Tennessee also asserts that the Newcombe and Jensen Scale of Ill Effects is inapplicable to “wet crossings.” The Newcombe and Jensen scale is a method by which the response of fish to suspended solids concentrations in the water can be measured. The use of this scale provides DES with a clear and unambiguous method to regulate environmental impacts by imposing penalties for potential damage to fisheries and habitat. The method of crossing is irrelevant in determining the level of damage sustained by fisheries and fish habitat. The level set by Condition 58 (g)(iv) is the level at which impairment to the fisheries increase from a moderate degree to a major degree. The Committee finds that this is a reasonable method and level of severity to employ in determining whether penalties should apply.

The condition, as suggested by the Applicant, requires DES to determine that there has been a “severe impairment of a beneficial use” before fines or penalties could be imposed. However, the term “severe impairment of a beneficial use” is not defined and escapes sufficiently precise definition. The Committee finds that the existing condition is reasonable, unambiguous and easily capable of determination by DES. Indeed, DES used the Newcombe and Jensen scale to interpret the concept of “severity” during construction of the PNGTS pipeline. Therefore, that portion of the Motion seeking to “clarify” Condition 58 (g) (iv) is denied.

IX. CONCLUSION

For the Reasons set forth in this Order, the Motion of Tennessee Gas Pipeline Company To Amend and Clarify the Certificate of Site and Facility in this docket is Granted , in part, and Denied in part.

ORDER

For the reasons set forth above its hereby:

ORDERED: That the Certificate of Site and Facility in this Docket shall be amended to include the route alignment, described as "Alternate I," as shown in Exhibit Tennessee A submitted to the Committee on July 9, 2001; and,

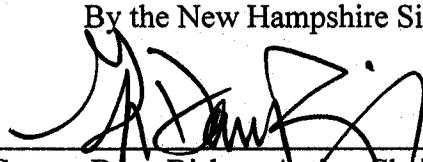
FURTHER ORDERED: That the Department of Environmental Services and other applicable state agencies are authorized to approve such amendments to existing permits and approvals as may be necessary to conform to the new alignment; and,

FURTHER ORDERED: That the Applicant shall complete construction of the Project in the area of the Londonderry Schools no later than September 19, 2001; and

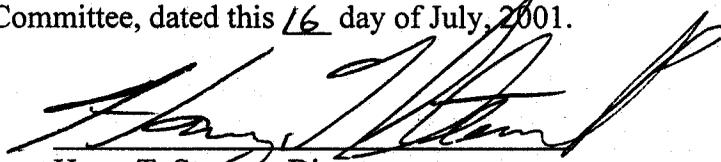
FURTHER ORDERED: That the Certificate of Site and Facility is amended to reflect that, pursuant to RSA 162-H:4, III-a, the Department of Environmental Service is delegated the authority to specify minor changes in the route alignment as the project proceeds through construction; and,

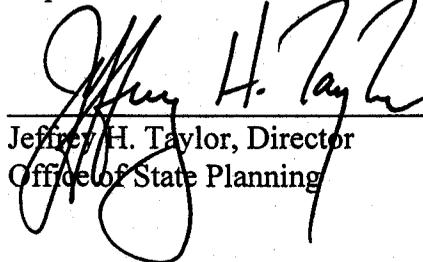
FURTHER ORDERED: That the portion of the Applicant's motion seeking clarification of environmental condition 58 (g) (iv) is Denied.

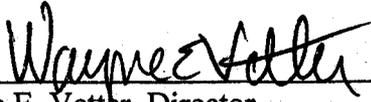
By the New Hampshire Site Evaluation Committee, dated this 16 day of July, 2001.


George Dana Bisbee, Acting Chairman
Assistant Commissioner, Department of
Environmental Services


Douglas L. Patch, Chairman
Public Utilities Commission


Harry T. Stewart, Director
Water Division
Department of Environmental Services

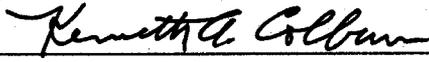

Jeffrey H. Taylor, Director
Office of State Planning



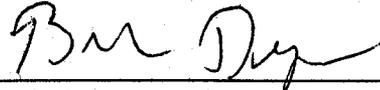
Wayne E. Vetter, Director
Fish and Game Department



Carol Murray, Commissioner
Department of Transportation



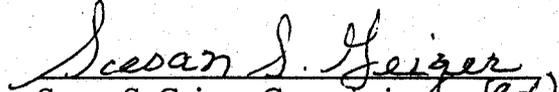
Kenneth A. Colburn, Director
Air Resources Division
Department of Environmental Services



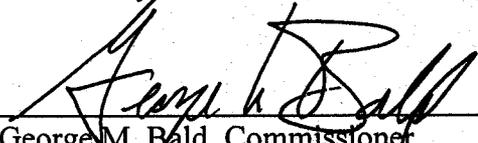
Brook Dupee, Assistant Director
Office of Community & Public Health
Department of Health & Human Services



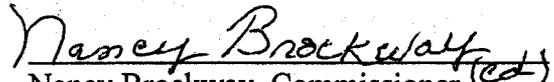
MaryAnn Manoogian, Director
Governor's Office of Energy &
Community Services



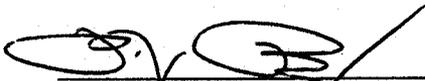
Susan S. Geiger, Commissioner (cd)
Public Utilities Commission



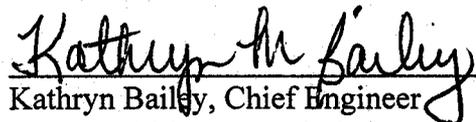
George M. Bald, Commissioner
Department of Resources & Economic
Development



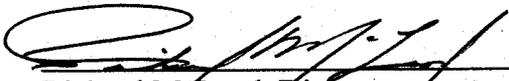
Nancy Brockway, Commissioner (cd)
Public Utilities Commission



Philip Bryce, Director
Division of Forests & Lands
Department of Resources & Economic
Development



Kathryn Bailey, Chief Engineer
Public Utilities Commission



Richard McLeod, Director
Division of Parks
Department of Resources & Economic
Development